Employment Standards TRIBUNAL

An appeal

- by -

Sun Peaks Mountain Resort Association
(the "Association")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

pursuant to Section 112 of the
Employment Standards Act R.S.B.C. 1996, C.113

ADJUDICATOR: David B. Stevenson, Panel Chair
Michelle Alman
Gwendolynne Taylor

FILE No.: 2001/137

DATE OF DECISION: August 17, 2001

DECISION

OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the *"Act"*) brought by Sun Peaks Mountain Resort Association (the "Association") of a Determination that was issued on February 1, 2001 by a Delegate of the Director of Employment Standards (the "Director"). The Determination denied an application made by Association under Section 72 of the *Act* to vary the provisions of Section 35, maximum hours of work, and Section 40, overtime wages for employees not on a flexible work schedule, in respect of the employment of three employees working at the Association Sports Centre.

The Director denied the application on the basis that the requested variance did not identify a benefit to the employees sufficient to justify an alteration to the minimum employment standards set out in Section 35 and Section 40 of the *Act*.

The Association disagrees with the conclusion that there is insufficient benefit to the employees from the requested variance. While on its face, the appeal does little more than disagree with the decision made by the Director, there is a more substantial issue that arises from the analysis made by the Director of the application.

ISSUE

The issue in this appeal is whether Director acted unreasonably in denying the variance application.

FACTS

The Association operates a sports centre at the Sun Peaks Resort near Kamloops, British Columbia. At the time of the application, the Association employed four persons at the Sports Centre, Vic Beisel, who held the position of Sports Centre manager, John Viliua, Mike Jorgenson and Kaz Farch.

The Determination notes that the application did not comply with all the requirements for such an application, which are set out in the *Employment Standards Regulation* (the *"Regulation"*):

30. (1) To apply under section 72 of the Act for a variance, a letter must be sent to the director.

(2) The letter must be signed by the employer and a majority of the employees who will be affected by the variance and must include the following:

(a) the provision of the Act the Director is requested to vary;

(b) the variance requested;

(c) the duration of the variance;

(d) the reason for requesting the variance;
(e) the employer's name, address and telephone number;
(f) the name, and home phone number of each employee who signs the letter.

The application did not include the reason for requesting the variance and did not include the name and home telephone number of the employees who signed the application letter.

The application requested that one of the employees, Mike Jorgenson, work two 11.5 hour shifts a week, in addition to shifts of 4.5 hours, 5 hours and 7 hours, for a total of 39.5 hours a week, and another employee, John Viliua, work one 11.5 hour shift a week, in addition to shifts of 4.5 hours (for 3 shifts) and 7 hours (for 2 shifts), for a total of 39 hours a week. The application requested the variance to last through the winter.

ARGUMENT AND ANALYSIS

Section 72 of the *Act* empowers the Director to grant a variance of several provisions of the *Act*, including Section 35 (maximum hours of work) and Section 40 (overtime wages for employees not on a flexible work schedule). As the Determination correctly noted, Section 73 of the *Act* provides the Director with a discretion in respect of an application under Section 72 of the *Act*. That provision states:

73. (1) The director may vary a time period or requirement specified in an application under section 72 if the director is satisfied that
(a) a majority of the employees who will be affected by the variance are aware of its effect and approve of the application, and
(b) the variance is consistent with the intent of this Act.
(2) In addition, if the application is for a variance of a time period or a requirement of section 64 the director must be satisfied that the variation will facilitate
(a) the preservation of the employer's operations,
(b) the orderly reduction or closure of the employer's operations, or
(c) the short term employment of employees for special projects.
(3) The director may
(a) specify that a variance applies only to one or more of the employer's employees,
(b) specify an expiry date for a variance, and
(c) attach any conditions to a variance.
(4) On being served with a determination on a variance application, the employer must display a copy of the determination in each workplace, in locations where the determination can be read by any affected employees.

The question that arises by virtue of Sections 72 and 73 of the *Act* is whether a variance to the maximum hours of work provisions in Section 35 and the overtime requirements in Section 40 should be granted.

The matters to be considered in arriving at that determination are those found in Section 73(1) of the *Act* and Section 30 of the *Regulation*.

This appeal is about how the Director has exercised her discretion in this case.

The discretion given to the Director under Section 73 of the *Act* is broad and generous. In deciding whether to grant a variance application such as the one made in this case, there are only two limitations placed on the exercise of discretion by the Director. First, the Director must be satisfied the affected employees are aware of the effect of the variance and approve of the application. Second, the Director must be satisfied that the application is consistent with the intent of the *Act*. The following statement, from *Joda M. Takarabe and others*, BC EST #D160/98 confirms the approach taken by the Tribunal when asked to interfere with an exercise of discretion by the Director under Section 73(1):

> In *Jody L. Goudreau et al* (BC EST # D066/98), the Tribunal recognized that the Director is "an administrative body charged with enforcing minimum standards of employment . . ." and ". . . is deemed to have a specialized knowledge of what is appropriate in the context of carrying out that mandate." The Tribunal also set out, at page 4, its views about the circumstances under which it would interfere with the Director's exercise of her discretion in administering the *Act*:
>
> > The Tribunal will not interfere with the exercise of discretion unless it can be shown the exercise was an abuse of power, the Director made a mistake in construing the limits of her authority, there was a procedural irregularity or the decision was unreasonable. Unreasonable, in this context, has been described as being:
> >
> > > . . . a general description of the things that must not be done. For instance, a person entrusted with discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting "unreasonably". *Associated Provincial Picture Houses v. Wednesbury Corp.* [1948] 1 K.B. 223 at 229
> >
> > Absent any of these considerations, the Director even has the right to be wrong.
> >
> > Section 81 of the *Act* requires the Director to include, in a determination, the reasons for it. When assessing an argument that the Director has considered immaterial factors or failed to consider material factors, the Tribunal will confine itself to an examination of the relevant determination.

> In *Boulis v. Minister of Manpower and Immigration* [(1972), 26 D.L.R. (3d) 216 (S.C.C.)] the Supreme Court of Canada decided that statutory discretion must be exercised within "well established legal principles". In other words, the Director must exercise her discretion for bona fide reasons, must not be arbitrary and must not base her decision on irrelevant considerations.

There is no suggestion in this appeal that the Director abused her power or acted in bad faith, that she made a mistake construing the limits of her authority or that there was any procedural irregularity when exercising discretion. The substance of the appeal raises a question about whether the Director failed to give consideration or effect to relevant considerations. Although the appeal is not expressly framed in terms of whether the Director fettered her discretion, that issue permeates the appeal. The Association says, in effect, the Director took an unnecessarily narrow view of factors relevant to the variance request. In dealing with this issue, we appreciate the comments of Southin, J.A. in *Saunders Farms Ltd. v. British Columbia (Liquor Control and Licensing Branch, General Manager)*, (1995) 122 D.L.R. (4th) 260 at 261:

> At the heart of the appellant's case is the principle that a tribunal upon whom, by statute, a discretion is conferred may not fetter its discretion save to the extent the statute expressly or implicitly authorizes. The principle is easy enough to state. But, in truth, it is a principle vague in its limits with a good deal of the chancellor's foot in its application.

The Association says the Director should have considered their ability to pay overtime and the effect the denial of the variance would have on both the ability of the Association to continue providing full-time hours to the two affected employees and the effect on those employees if they were limited to part-time hours. In the appeal, the Association says their budget does not allow for the payment of overtime and the shorter shifts will affect the ability of the staff to make ends meet and compel them to seek other employment.

As noted in the above reference to *Re Joda M. Takarbe and others*, *supra*, the onus is on the Association to show the Tribunal would be justified in interfering with the exercise of discretion. As well, when assessing if the Director has improperly fettered her discretion in some way, the Tribunal will confine itself to an examination of the Determination.

In its analysis, the Determination referred to Section 4, which provides:

> *4. The requirements of this Act or the regulation are minimum requirements, and an agreement to waive any of those requirements is of no effect, subject to sections 43, 49, 61 and 69.*

It also referred to the process set out in Section 72 and 73 of the *Act*. The Determination did not state or otherwise indicate how either of these provisions contributed to an identification of the legislative intent referred to in Section 73(1)(b).

The Determination included the following analysis:

> . . . the Director will not exercise her authority unless and until it can be shown that the employees benefit by the requested relaxation of minimum employment standards. That employees accept an arrangement, given the prohibition set out in s. 4 and the process set out in ss. 72 and 73, does not decide the issue. If employee acceptance were sufficient, the Legislature would not have created ss. 4 or 73(1). The application must meet the Director's view of the intent of the *Act*. Simple opportunity for employment, in the Director's view, is not of itself a sufficient benefit to justify a variance.
>
> Section 40 provides for the payment of overtime wages for hours worked in excess of 8 hours in a day and 40 hours in a week. The application does not identify a benefit to these employees which is sufficient to justify the requested variation of their entitlement to overtime.

An analysis of the applicable statutory provisions begins with an examination of Section 2 of the *Act*, which contains a statement of the purposes of the legislation:

2. The purposes of this Act are to

(a) ensure that employees in British Columbia receive at least basic standards of compensation and conditions of employment,

(b) promote the fair treatment of employees and employers,

(c) encourage open communication between employers and employees,

(d) provide fair and efficient procedures for resolving disputes over the application and interpretation of this Act,

(e) foster the development of a productive and efficient labour force that can contribute fully to the prosperity of British Columbia, and

(f) contribute in assisting employees to meet work and family responsibilities.

While the Determination concluded the application did not meet the intent of the *Act*, when the Determination is examined in its entirety, the rationale for that conclusion remains unclear. In one respect, it appears to be based on a finding that no sufficient "benefit" to the employees was identified in the application. But even if that were so, there is nothing that indicates, either for the applicants or for an objective third party, the relevance or relationship of that finding to what the Director must consider under Section 73(1)(b) of the *Act*. Given the requirement in Section 81 of the *Act* to provide the reasons for a Determination, it is not enough to simply state the conclusion. There must be a degree of analysis sufficient to identify the considerations that comprised the conclusion. For example, the Determination appears to find support in the requirements of Section 30 of the Regulation, but there is, on its face, nothing in that provision requiring an application under Section 72 of the *Act* to include a "corresponding benefit to employees" in the application for the variance.

In its conclusion, the Determination stated:

> This application does not identify any benefit to the employees which is sufficient to justify the requested alteration of their entitlement to a minimum employment standard.
>
> . . . I find the application . . . is not consistent with the intent of the Act.
>
> . . . I find the application . . . does not meet the requirements of s. 30 of the Regulation, in that it lacks a corresponding benefit to the employees.

We have some concerns with the manner in which the Director has made her findings.

It is clear from a reading of the *Act* as a whole that the main purpose and objective, and the fundamental statement of the intent of the *Act*, is that found in Section 2(a) - to ensure employees are provided with basic standards of compensation and conditions of employment. As the Tribunal has noted in several decisions, adopting the comments of the Supreme Court of Canada in *Machtinger v. HOJ Industries Ltd.*, [1992] 1 SCR 986, the *Act* is remedial legislation governing employment and should be read in a way that encourages employers to comply with the minimum requirements found in the *Act* and extends protection of the *Act* to as many employees as possible. As noted above, a variance that derogates from the basic standards of compensation and conditions of employment is not consistent with the intent of the *Act*. Having said that, however, it is wrong to suggest that Section 2(a) expresses the full intent of the *Act*.

Such a suggestion would ignore the other statements of purpose found in Section 2 of the *Act*. Of particular note in the context of the variance application made by the Association (as they will be in many variance applications) are the objectives of promoting fair treatment for employees and employers, fostering a productive and efficient workforce and contributing in assisting employees to meet work and family responsibilities. The Legislature must have intended those statements of purpose be given some effect in the context of administering the *Act*. There is nothing in the reasons for the Determination indicating these matters have been considered or, if they have, what effect they have or have not been given. These are necessary elements to any Determination, particularly one that denies a variance.

As well, such a suggestion would ignore several specific provisions of the legislation. It is clearly not the intention of the Legislature that every employee falling within the scope of the *Act* should receive only the minimum standards set out in the *Act*. Had that been the Legislature's intention, it could have easily been accomplished. In fact, that was not the Legislature's intent and the *Regulation* list a substantial number of persons and occupations to whom the *Act*, or parts of the *Act*, does not apply (see Sections 31 to 44 of the *Regulation*). As noted by the Tribunal in *Re Williston Navigation Inc.*, BC EST #D391/00 at page 11:

> The *Act* is broad based public policy legislation. The fact that the exclusions in Section 34 exist at all suggests the legislature has accepted that, as a matter of public policy, it would be inconsistent with the *Act's* objectives, as well as being

unfair, to require that such work be performed within the framework of the hours of work and overtime requirements of the *Act*. For the most part, the work performed by excluded employees has unusual or unique features that do not allow it to conform with the requirements found in Part 4 of the *Act*. In my view, the following statement, noted in the Determination as having been made by Williston during the investigation, is a reasonably accurate description of the basis for the exclusions found in Section 34 of the *Regulation*:

> . . . in looking at the type of worker that is exempt from Part 4 of the Employment Standards Act it would appear that the distinction is based on the inability of the employer to function in business if they were held to the strict standards of Part 4. The Act recognizes that some occupations have built into them a need or expectation of different hours of work or overtime due to the nature of the employment.

The above statement is supported by Professor Mark Thompson in *Rights and Responsibilities in a Changing Workplace: A Report on Employment Standards in British Columbia* at page 31 of the Report, where he says that:

> . . . exclusions should be based on factors inherent to the work performed.

Generally speaking, whether an employee is excluded from all or parts of the *Act* does not depend on whether there is a perceived corresponding benefit for the excluded employees. Rather, exclusions are based on factors inherent to the work performed, which include considerations of fairness, economic viability and unusual or unique features of the particular employment. In our view, and in light of the basis upon which the variance was sought, there should have been assessment of the particular features of the employment and the impact on the employer to operate without the variance.

As well, while the primary objective of the *Act* is to ensure employees are provided with basic standards of compensation and conditions of employment, Sections 43, 49, 61 and 69 of the *Act* allow trade unions and employers whose employees are represented by trade unions to negotiate provisions in a collective agreement that are less than specific minimum standards, provided that those provisions, when taken as a whole meet or exceed the minimum standards of the *Act*. It can be taken from the existence of those provisions that the legislature intended to allow for a relaxation of minimum standards in some Parts of the *Act* provided the compensation and conditions of employment, taken as a whole, met or exceeded minimum requirements of the corresponding Part of the *Act*. In our view it is appropriate in a variance application, and consistent with the intent of the *Act*, to consider the compensation and conditions of the relevant employment as a whole in determining whether the resulting variance will give an employee less than basic compensation and conditions of employment.

The above comments are not intended to be an exhaustive list of matters that should be addressed by the Director when deciding if a variance application is consistent with the intent of the *Act*. Circumstances of a particular variance application may vary and compel consideration of other

factors that are consistent with the intent of the *Act*. The point of the above analysis is to indicate that the Director cannot simply say no variance will be granted unless the application shows the employees will benefit from the requested relaxation of minimum standards. That response does not adequately address the intent of the *Act* and is an improper fettering of discretion by the Director.

ORDER

Pursuant to Section 115 of the *Act*, I order the Determination dated February 1, 2001 be cancelled and the matter referred back to the Director.

David B. Stevenson
Adjudicator
Employment Standards Tribunal

Michelle Alman
Adjudicator
Employment Standards Tribunal

Gwendolynne Taylor
Adjudicator
Employment Standards Tribunal